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Via Electronic Comment Filing System

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Ex Parte Presentation*
CC Docket Nos. 01-338, 98-147, 96-98

Dear Ms. Dortch:

A number of recent *ex parte* submissions have addressed the issue of “usage restrictions.” In general, the purpose of such restrictions is to identify those network elements used to provide “local” service and exclude those used exclusively or predominately to provide access to long distance networks. CMRS carriers clearly provide local service, yet could be precluded from accessing UNEs to which they are otherwise eligible if the restrictive criteria are based on wireline network configurations or require local certifications not applicable to CMRS carriers. If the Commission finds that CMRS carriers are impaired without access to unbundled transport, AWS urges the Commission to exercise caution in adopting new or extending current usage restrictions to ensure that they do not inadvertently preclude CMRS carrier access to those UNEs.¹

CMRS Carriers Provide Local Service

There is no question that CMRS carriers provide local service. Thus, to the extent that usage restrictions are designed to enable access to UNEs for local service, but not solely for long distance services, usage restrictions should in no way hamper CMRS carrier access to UNEs.

¹ In addressing these issues, AWS does not intend to suggest that usage restrictions should continue. Usage restrictions have been enormously problematic and are unnecessary if the Commission undertakes a granular analysis. If usage restrictions are continued, however, they should not apply to stand alone UNEs or to new combinations.

The Commission has determined that the services that CMRS carriers provide fall within the statutory definition of “telephone exchange service” because they “provide *local*, two-way switched voice service as a principal part of their business.”² As noted in the *Local Competition Order*, CMRS carriers are “generally engaged in the provision of *local* exchange telecommunications in conjunction with the local telephone companies”³ The Bell companies agree that CMRS carriers are engaged primarily in the business of providing local service. As Verizon (then NYNEX) wrote in comments to the original *Local Competition Order*: “[CMRS carriers] provide local exchange and exchange access service within the LEC’s local exchange area for much of their traffic.”⁴ It was on the basis of the determination that CMRS carriers provide telephone exchange service that the Commission concluded that CMRS carriers are entitled to obtain interconnection with LECs under section 251(c)(2).⁵

Moreover, the Commission found that CMRS carriers exchanged local traffic with LECs and were thus subject to the reciprocal compensation regime established pursuant to section 251(b)(5).⁶ Significantly, the Commission defined “local traffic” for purposes of its current use restrictions as traffic that “is subject to a reciprocal compensation arrangement between the requesting carrier and the incumbent LEC.”⁷ AWS, like other CMRS carriers, has entered into reciprocal compensation arrangements with all major LECs, and has paid millions of dollars to the LECs to terminate local calls originated by AWS’s customers.

Finally, further evidence that CMRS carriers provide a significant amount of local service is found in the mobile wireless safe harbor established for universal service contribution purposes. Under this safe harbor, CMRS carriers may assume that no more than 28.5% of their revenue is interstate.⁸ This figure was based on a study showing the percentage of interstate traffic carried by CMRS carriers ranged from 10 percent to 28.5 percent.⁹ Granted, the fact that 71.5% to 90% of CMRS traffic is intrastate (as found in the study) does not necessarily mean that all of these calls are “local.” It does, however, highlight the fact that the facilities used by CMRS carriers are not used exclusively to originate or terminate long distance calls. Customers use their cellular phones in the same way as landline phones – sometimes they make local calls, sometimes they make long distance calls. And when a LEC provides access between a CMRS carrier and long distance carrier for those calls that are long distance calls, the LEC receives access

² *Local Competition Order*, 11 FCC Rcd at 16000, ¶ 1013 (emphasis added).

³ *Id.* (emphasis added); see also *In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Memorandum Opinion and Order, 59 Rad. Reg. 2d 1275, 1284, ¶ 12 (1986) (cellular carriers are primarily engaged in the provision of local, intrastate exchange telephone service).

⁴ NYNEX Comments in CC Docket No. 96-98, filed May 16, 1996, at 22.

⁵ Interconnection under section 251(c)(2) is available to requesting carriers “for the transmission and routing of telephone exchange service and exchange access.”

⁶ *Local Competition Order*, 11 FCC Rcd at 16013, ¶ 1034; 16016, ¶ 1041.

⁷ *Supplemental Order Clarification*, 15 FCC Rcd 9587 at n.64.

⁸ *CMRS Safe Harbor Order*, 17 FCC Rcd 24952, ¶ 21 (2002).

⁹ *Id.* ¶ 22.

charges. Those access charges would in no way be affected by converting transport links between cell sites and mobile switches to UNEs.

Wireline-Centric Criteria Could Inadvertently Exclude CMRS Carriers

Even though CMRS carriers provide local service, usage restrictions that are based on wireline network configurations or LEC certifications could be used by the incumbent LECs to preclude CMRS carrier access to UNEs. This is not an idle concern. Incumbent LECs have in the past refused to convert to UNEs transport facilities purchased from special access tariffs on the ground that CMRS carriers did not meet the technical criteria in the existing “safe harbors,” even though the CMRS carrier certified compliance with the local usage requirement.

For example, AWS requested conversion of the transport facilities between cell sites and mobile switches. Because the incumbent LECs had taken the position that they were not required to convert any facility (whether an EEL or stand alone facility) purchased from a special access tariff unless one of the safe harbors was met, AWS certified that it met the local usage requirements under the third safe harbor test established in the *Supplemental Order Clarification*.¹⁰ Even though the incumbent LECs did not dispute that the requisite percentage of local usage had been met, they refused to convert the facility. Verizon and Sprint, for example, made up the requirement that each circuit had to be connected directly to an end user, and, because circuits to base stations do not connect to an “end user,” these carriers denied AWS the right to convert the facilities to UNEs.¹¹

Given Verizon’s position that the UNEs requested by CMRS carriers in this proceeding could never satisfy the existing safe harbor tests (no matter how much local traffic is actually carried on them), AWS is particularly alarmed with Verizon’s recent suggestion that the current safe harbor rules remain in effect.¹² Verizon suggests that the rules should be maintained because they were the result of negotiations by a “broad cross-section of the telecommunications industry”¹³ That “broad section” wholly excluded the CMRS industry. In fact, a number of CMRS carriers, including AWS, expressed grave concern about the proposed wireline-centric safe harbors and their potential impact on CMRS carriers’ ability to obtain UNEs.¹⁴ Unfortunately, those

¹⁰ Under this provision, the requesting carry must certify that “at least 50 percent of the activated channels on a circuit are used to provide originating and terminating local dialtone service and at least 50 percent of the traffic on each of these local dialtone channels is local voice traffic, and that the entire loop facility has at least 33 percent local voice traffic.” *Supplemental Order Clarification*, 15 FCC Rcd 9587, ¶ 22(3).

¹¹ See AWS June 26, 2000 *ex parte*, filed in CC Docket No. 96-98 (attaching January 18, 2001 letter from Verizon to AWS and March 28, 2001 letter from Sprint to AWS).

¹² Letter from William P. Barr, Verizon to Chairman Michael K. Power, Federal Communications Commission, CC Docket Nos. 01-338, 96-98, 98-147 (filed Jan. 30, 2003) (Verizon Jan. 30, 2003 *Ex Parte*).

¹³ Verizon Jan. 30, 2003 *Ex Parte* at 5.

¹⁴ Letter from AT&T Wireless, VoiceStream and United States Cellular Corporation, to Chairman William E. Kennard, *et al.*, CC Docket No. 96-98 (filed Apr. 12, 2000).

concerns were not addressed – or even acknowledged and the result was just as the CMRS carriers feared.

AWS thus supports efforts to reform the existing usage restrictions. The current restrictions have had the effect of excluding facilities that clearly are used to provide local service. AWS is concerned, however, that some of the proposed criteria may inadvertently exclude CMRS carriers. These proposals seek to ensure that carriers that provide “LEC-services” in competition with the incumbent have access to UNEs without having to demonstrate some actual percentage of local usage on a circuit-by-circuit basis. (Although AWS can meet any reasonable circuit-by-circuit local usage requirement, AWS is sympathetic to the problems caused by such an approach.) NuVox, for example, defines LEC services as “local voice, exchange access, Internet access, and point-to-point local data services.”¹⁵ AWS provides all of these services, and does so increasingly in direct competition with the incumbent. Thus, AWS does not object to this approach.

AWS’s concern arises with the evidentiary proof designed to demonstrate that a carrier is providing “LEC” services. Although AWS provides local services, AWS is not a “local exchange carrier.” Indeed, Congress specifically excluded CMRS carriers from the statutory definition of “local exchange carrier,” unless the Commission finds otherwise.¹⁶ Even though the Commission has found that CMRS carriers provide telephone exchange service, it has not defined CMRS carriers as LECs.¹⁷ Thus, CMRS carriers do not file local tariffs, and they are not required to obtain local certifications – even though they provide local exchange service.

Some carriers have also suggested structural criteria as a proxy for local service. Some of these criteria apply to both wireline and wireless networks, some do not. For example, Cbeyond and Nuvox have suggested that the existence of interconnection trunks used to exchange reciprocal compensation traffic is an indicator of providing local service. AWS could comply with such criteria, assuming it were not strictly measured with respect to LATAs or were associated with the specific circuit being converted.¹⁸ CMRS carriers typically also have 911 trunking. Some carriers have identified 911 trunking as providing evidence that the carrier is providing local service. Carriers should not, however, be required to somehow associate 911 trunks to the particular circuit being requested as a UNE.

On the other hand, CMRS carriers generally do not establish collocation arrangements in incumbent LEC wire centers. Collocations generally are used by CLECs to access local loops. CMRS carriers have built their own “local loops” by investing billions of dollars in spectrum. They therefore have no need to build collocation

¹⁵ Letter from John J. Heitmann, NuVox, to Michelle Carey, Federal Communications Commission, CC Docket Nos. 01-338, 98-147, 96-98 at 2 (filed Jan. 23, 2003) (NuVox January 23, 3003 *Ex Parte*).

¹⁶ 47 U.S.C. 153(26).

¹⁷ *Local Competition Order*, 11 FCC Rcd at 16000, ¶ 1014. The Commission noted that Congress must have viewed CMRS carriers as providing LEC-type services, or else it would not have felt the need specifically to exclude CMRS carriers from the definition of a LEC. *Id.*

¹⁸ CMRS carriers obtain wireless licenses on the basis of Major Trading Areas, which typically do not conform to LATA boundaries.

arrangements, and imposing a usage restriction around such a requirement would discriminate against wireless architectures. Similarly, proposals to require that local telephone numbers be assigned to the requested circuit would not apply to CMRS carriers because the circuit CMRS carriers seek terminates at a cell site. There are thus no local numbers associated with that circuit, even though the circuit carries local calls.

Finally, some have suggested that circuits that terminate to switches that are *not* used solely for long distance service, should qualify as UNEs. CMRS carriers would meet these criteria since the switches located in mobile switching centers are not used solely for long distance.

The key point is that architectural tests designed as proxies for local service must not discriminate against wireless networks. Wireless networks perform many of the same functions as wireline networks, but they have certain unique characteristics that differentiate them from typical CLEC network architectures. These unique characteristics render some of the structural criteria proposed by the CLEC community inapplicable to CMRS carriers.

Adopting Technology-Neutral Usage Criteria

In light of the foregoing, AWS urges the Commission to exercise caution in adopting new usage restrictions and ensure that CMRS carriers are not unintentionally precluded from obtaining access to those UNEs that the Commission otherwise finds have satisfied the impairment test. The most straightforward approach would be to hold that usage restrictions have no applicability to CMRS carriers. Given that CMRS carriers clearly are in the business of providing telephone exchange service along with exchange access, there is no basis for applying to CMRS carriers restrictions designed to cull out circuits used solely for long distance purposes. Customers do not purchase cellular phones just to originate or terminate long distance calls, and the circuits used to carry those calls back to mobile switching centers are also, therefore not used solely to originate or terminate long distance calls.

If the Commission intends to adopt structural criteria and apply this criteria to CMRS carriers as well, the test ought to include criteria equally applicable to CMRS carriers as to wireline carriers. Among the criteria that have been proposed which would apply equally to CMRS carriers are (1) having interconnection trunks in place (in the MTA for CMRS carrier purposes); or (2) having the UNE circuits terminate to a switch that does not provide solely interexchange services (or terminate to a node – but not a collocation necessarily – that cross connects that circuit to transport terminating to a qualifying switch); or (3) having 911 trunks in place. Alternatively, carriers should have the option – but not the requirement – to demonstrate compliance with a local usage percentage, as long as the percentage is applied to the circuit as a whole.

Finally, if the Commission determines to maintain the existing safe harbors, AWS respectfully requests that the Commission should clarify either that: (1) the existing safe harbors do not apply to CMRS carriers and cannot be used to restrict CMRS carrier

access, or (2) permit CMRS carriers to certify that they meet the local usage percentage requirements without having to show that the circuit terminates to a specific end user or that the circuit terminates to a collocation. The establishment of collocation arrangements should be based on business and engineering needs, not an arbitrary policy determination that collocation is a proxy for local service when they clearly are not for CMRS carriers.

Consistent with Commission rules, I am filing one electronic copy of this notice and request that it be placed in the record of the above-referenced proceedings.

Very truly yours,

/s/ Douglas I. Brandon
Douglas I. Brandon
AT&T Wireless Services, Inc.

cc: Christopher Libertelli, Legal Advisor to Chairman Michael K. Powell
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